No. 83-431

In The

Supreme Court of the United States

October Term, 1983

JEFFREY B. BATTLE, *et al.*,
Petitioners,

v.

THE LUBRIZOL CORPORATION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE LUBRIZOL CORPORATION IN OPPOSITION TO PETITION

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October 8, 1983

COUNTERSTATEMENT OF THE QUESTION PRESENTED

The sole issue raised by this case is whether the district court correctly granted summary judgment on the grounds that petitioners failed to show the elements necessary to support a *per se* theory of liability under Section 1 of the Sherman Act, 15 U.S.C. § 1, because, in the absence of any evidence that the Lubrizol Corporation was motivated by price considerations, there was no evidence from which a jury could infer a conspiracy to terminate petitioners *for a "price related end."*

PARTIES TO THE PROCEEDINGS

Petitioners Jeffrey B. and Karen Battle, doing business as Bayview Service and Supply Co., and Anchor Supply Co., Inc., were appellants below on the questions presented for review.[1]

Respondents the Lubrizol Corporation (Lubrizol), Jenkin-Guerin, Inc. (Jenkin-Guerin) and Jack K. Krause (Mr. Krause) were appellees below on the questions presented for review.[2]

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[1] Pursuant to a motion by respondents Jenkin-Guerin, Inc. and Jack Krause, the district court on August 27, 1980 added two individuals, Gordon and Thomas Watson, as defendants to the counterclaims asserted by respondents Jenkin-Guerin, Inc. and Jack Krause against them and petitioners. Those counterclaims are not involved in the petition at issue here.

[2] Lubrizol's non-wholly owned subsidiaries are Industrias Lubrizol, S.A. de C.V. (Mexico); Lubrizol India Limited; and Industria de Aditivos do Brasil S.A.

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For the reasons set forth herein, respondent Lubrizol respectfully requests that the petition for a writ of certiorari to review the judgment and decision of the Court of Appeals for the Eighth Circuit, entered on July 12, 1983, be denied.

OPINIONS BELOW

The opinion of the district court granting Lubrizol's motion for summary judgment is reported at 513 F. Supp.

995. The decision of the Court of Appeals for the Eighth Circuit affirming the district court by an equally divided court *en banc* is reported at 712 F.2d 1238.

COUNTERSTATEMENT OF THE CASE

Petitioners Jeffrey B. Battle (Mr. Battle) and Karen Battle, doing business as Bayview Service and Supply Co. and Anchor Supply Co., Inc., alleged that Lubrizol conspired with respondents Jenkin-Guerin and Mr. Krause, Jenkin-Guerin's president, to refuse to sell a certain rust-proofing compound to Mr. Battle or his affiliated companies in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and the Missouri Antitrust Law, R.S. Mo. § 416.031(1)(1978). The complaint alleges that the purpose of the conspiracy was to fix, stabilize and maintain the price of the compound.

The judgment at issue here is the order of the district court, filed May 11, 1981, granting summary judgment in favor of Lubrizol. The undisputed facts are as follows:[3]

1. Lubrizol initially decided to sell its rust-proofing compound to petitioners upon Mr. Battle's representation to Lubrizol that he intended to market the compound for marine applications, a previously undeveloped market for the compound. Lubrizol was satisfied with the distribution of the product for automotive use and would not have sold to petitioners if they had disclosed that they intended

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[3] Of the following paragraphs, paragraphs 1, 2 and 7 through 10 recite facts upon which the district court expressly relied in granting summary judgment. The facts of record in paragraphs 3 through 6 were cited by Lubrizol in its Statement of Material Facts in support of its motion for summary judgment and are undisputed by petitioners. The Statement of Material Facts, which petitioners cite selectively, Petition at 4, is reprinted in its entirety (with the exception of documentary attachments) in an appendix to this brief for the convenience of the Court.

to sell the compound for automotive applications. Mr. Battle's misrepresentation that he intended to pursue the marine market induced Lubrizol to sell to him. *Battle v. Lubrizol Corp.*, 513 F.Supp. 995, 997 (E.D. Mo. 1981), *aff'd by an equally divided court*, 712 F.2d 1238 (8th Cir. 1983) (*Battle*).

2. After only one sale of a limited quantity to petitioners, two Lubrizol employees became aware, through telephone calls by Mr. Krause, that plaintiffs were selling to Jenkin-Guerin's automotive customers at prices below Jenkin-Guerin's. By this means, Lubrizol first became aware that petitioners were not, in fact, pursuing the marine market. *Battle*, 513 F.Supp. at 997.

3. At no time did Mr. Krause (contrary to petitioners' representation, Petition at 13) request that Lubrizol terminate Mr. Battle as a distributor. The telephone communications from Mr. Krause to Lubrizol, through which Lubrizol learned that petitioners were selling the product for automotive use, included general complaints by Mr. Krause about other aspects of petitioners' behavior as well, such as Mr. Krause's concern about Mr. Battle's hiring of Jenkin-Guerin's former star salesman, Gordon Watson, and the misappropriation by petitioners of Mr. Krause's customer list. Memorandum of Defendant Lubrizol in Support of Motion for Summary Judgment, Statement of Material Facts (Statement of Material Facts) ¶ 16, Appendix at A-10.

4. Lubrizol, through its distribution department, determined that the one shipment of compound it had sold to petitioners had been shipped to a Cleveland warehouse, and not to any point logically situated to distribute the product for marine use on the Gulf Coast, where petitioners were located. Statement of Material Facts ¶ 17, Appendix at A-12. In fact, *none* of the compound which

petitioners purchased from Lubrizol had been, as of the date of Mr. Battle's testimony, sold for marine use. Statement of Material Facts ¶ 22, Appendix at A-16.

5. One of the Lubrizol employees who received Mr. Krause's telephone calls advised the responsible supervisory officer of Lubrizol, Mr. William Bares, concerning Mr. Krause's telephone calls and the fact that petitioners were not developing marine applications. Mr. Bares thereafter decided that Lubrizol would cease doing business with petitioners. Mr. Bares was the sole Lubrizol officer responsible for that decision. Statement of Material Facts ¶¶ 17-18, Appendix at A-12.

6. Mr. Bares' exclusive reasons for terminating petitioners were, first, his belief that Mr. Battle was not developing the marine area and, second, his discomfort with what he thought was deception by Mr. Battle in initiating his relationship with Lubrizol. Statement of Material Facts ¶ 18, Appendix at A-12.[4] Mr. Bares was not informed by anyone that petitioners were selling the product at prices below Jenkin-Guerin's. Deposition of William G. Bares, Tr. 51.

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[4] While petitioners incorrectly assert that "no reasons independent of the competitor's complaints existed for the action," Petition at 13, the record unequivocally shows that Lubrizol's decision was independent of any price consideration. The district court stated:

> Lubrizol contends *and has adequately supported this contention in the instant motion for summary judgment*, that Krause's complaints about plaintiffs did not affect its decision to terminate its sales to plaintiffs. Lubrizol claims that plaintiffs were cut off because they were not pursuing the marine market as Lubrizol expected them to, and because Lubrizol considered Battle to have been untruthful in the negotiations leading up to the initial sales.

Battle, 513 F. Supp. at 997 (emphasis added).

7. Lubrizol never discussed with petitioners suggested resale prices for the rustproofing compound; indeed, Mr. Battle admitted that Lubrizol employees told him that they did not want to know what Mr. Battle charged for it. *Battle*, 513 F.Supp. at 999.

8. Lubrizol never discussed with Jenkin-Guerin any resale price for the product. *Id.*

9. After ceasing to deal with plaintiffs, Lubrizol put petitioners in contact with its Cleveland area distributor, which thereafter agreed to sell petitioners all the product they desired, allowing them to continue to compete with and price below Jenkin-Guerin. *Id.*

10. Petitioners conceded that they could not show the anticompetitive effect necessary to prove a violation of Section 1 of the Sherman Act under the rule of reason. *Id.*

In granting Lubrizol's motion for summary judgment, the district court held that petitioners had offered evidence sufficient to present an issue of fact as to whether Lubrizol terminated Mr. Battle as a result of an agreement with Mr. Krause and Jenkin-Guerin. However, as the district court noted, "Plaintiffs . . . admit that they are unable to establish the anti-competitive effect necessary to prove a violation of the Sherman Act under the rule of reason." *Battle*, 513 F. Supp. at 998. In order to proceed to trial, therefore, petitioners were required to show that they were terminated pursuant to a *per se* illegal price related agreement, which they could not do. In particular, the district court held that petitioners failed to demonstrate facts from which a jury could infer that Lubrizol terminated Mr. Battle in order to protect Jenkin-Guerin from price competition. Since plaintiffs conceded that they could not prevail under the rule of reason, Lubrizol was entitled to summary judgment.

The district court's decision was affirmed by an equally divided Court of Appeals sitting *en banc*, *Battle v. Lubrizol Corp.*, 712 F.2d 1238 (8th Cir. 1983), so that the district court's decision stands and the Eighth Circuit decision is without precedential effect.[5] Hence, the Eighth Circuit affirmed, by an equally divided *en banc* court, the district court's decision that (1) the evidence was sufficient to allow a jury to infer an agreement, but (2) the agreement could not be *per se* unlawful because there was no evidence that it was price related.

Four of the judges of the Court of Appeals would have held that no jury issue existed at all with respect to the existence of an agreement. The other four judges would have held that a jury could infer an agreement from the evidence presented. All Eighth Circuit judges, and the district court, agreed, however, on the rule of law which they were applying: a termination of a distributor by a manufacturer pursuant to an agreement with a price related end would be *per se* illegal. *Battle*, 513 F. Supp. at 998.[6]

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[5] On March 4, 1982, a three-judge panel of the Eighth Circuit, by a vote of two to one, filed an opinion which, before it was vacated, would have reversed the district court. That panel opinion held, as did the district court, that the evidence could support an inference of an agreement between Lubrizol and Jenkin-Guerin. However, the panel, unlike the district court, found that a jury could infer that Lubrizol terminated plaintiffs in order to protect Jenkin-Guerin from price competition. *Battle* v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1981).

[6] The four judges of the Eighth Circuit who would have affirmed the district court adopted as their rationale the opinion which commanded the support of those same four judges in *Roesch, Inc. v. Star Cooler Corp.*, 712 F.2d 1235 (8th Cir. 1983) (*Roesch*), an *en banc* decision of the Eighth Circuit filed the same day as the decision in this case. *Roesch* involved facts similar to the facts in this case and is now before this Court on a petition for a writ of certiorari.

Because the district court decided the conspiracy question for petitioners and granted summary judgment as a result of petitioners' failure to present any evidence of a "price related end" of the conspiracy, petitioners have misstated the issue raised by this case (*see, e.g.*, Petition at 1, 2, 6).[7] The district court precisely stated the issue on summary judgment as follows:

> Resolution of the instant motion for summary judgment is therefore dependent on whether the alleged agreement was premised on a price-related end, since plaintiffs admit they cannot show an anti-competitive effect under the rule of reason.

Battle, 513 F. Supp. at 999.

SUMMARY OF ARGUMENT

The district court's opinion, which was affirmed by an equally divided court, does not create a precedent in the Eighth Circuit and does not create a conflict with any other circuit. The district court applied the very rule of law which petitioners assert here and found evidence "totally lacking" to support a finding of liability under that rule of law. The pendency of *Spray-Rite Service Corp. v. Monsanto Co.* does not constitute grounds for review of this case because the court below in that case applied the same rule of law asserted by petitioners here to a different set of facts to reach a different result. This case was decided on its own facts and presents no issues for review by the Supreme Court.

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[7] Respondents argued to the district court, and to the Eighth Circuit, that petitioners had produced insufficient evidence of a conspiracy to go to the jury, but that issue was decided for petitioners by the district court. Should this Court grant certiorari, respondents would again maintain that the evidence in this case is not sufficient grounds for inference of a conspiracy.

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT'S FAILURE TO REACH A DECISION IN THIS CASE IS WITHOUT PRECEDENTIAL EFFECT, DOES NOT CREATE A CONFLICT WITH ANY OTHER CIRCUIT, AND IS THEREFORE NOT APPROPRIATE FOR REVIEW BY THE COURT.

There is no appellate judgment having precedential effect in this case for the Court to review, because the Eighth Circuit's "decision" is, in actuality, a failure to reach a decision. *See Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers International*, 294 F.2d 399 (2d Cir. 1961), *aff'd*, 370 U.S. 254 (1962). Where a reviewing court fails to reach a decision and the decision below is affirmed for that reason, and that reason alone, "nothing is settled," *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 264 (1960), and there is nothing to review.

The Eighth Circuit's inability to reach a decision means that this case "is without precedential value" in the Eighth Circuit on the issue which petitioners seek to have reviewed. *Roesch*, 712 F.2d at 1236; *Battle v. Lubrizol Corp.*, 712 F.2d 1238, 1240 (8th Cir. 1983). All that can be said of the effect of this case, then, is that four judges would have affirmed the district court's judgment (although apparently on grounds in addition to those adopted by the district court), four judges would have reversed, and perhaps the issue will be resolved by the Eighth Circuit in some future case. Accordingly, the law of this case is the judgment of the district court alone, which does not create a conflict between the Eighth Circuit and any other circuit.

II. THE DISTRICT COURT APPLIED THE VERY RULE OF LAW ARGUED HERE BY PETITIONERS AND CORRECTLY FOUND THAT EVIDENCE WAS "TOTALLY LACKING" TO SUPPORT ANY INFERENCE THAT LUBRIZOL WAS MOTIVATED BY PRICE CONSIDERATIONS.

Even if the district court's opinion were to be taken as an opinion of the Eighth Circuit, that opinion is not in conflict with any decision of this Court or of any court of appeals. This case represents nothing more than a finding of a failure of proof in particular factual circumstances. The district court required only that petitioners show some evidence that they were terminated for a price related motive, and summary judgment was correctly entered because petitioners failed to do so. The district court found the following:

> Resolution of the instant motion for summary judgment is therefore dependent on whether the alleged agreement was premised on a price related end, since plaintiffs admit they can not show an anti-competitive effect under the rule of reason.
>
> *Lubrizol's evidence in this regard has not been disputed by plaintiffs.* Lubrizol never discussed with plaintiffs the price at which they should resell Lubrizol 2085A. Jeffrey Battle, in his deposition, even went so far as to state that Lubrizol told him that what he did with the product after he acquired it was none of Lubrizol's business, and that Lubrizol didn't want to know what Battle charged for it. Likewise, Gordon Watson [the former Jenkin-Guerin sales manager who left to join Mr. Battle's company and who was an employee of Mr. Battle at the time of his testimony] testified that Lubrizol never suggested the price at which Jenkin-Guerin should resell the product. After it refused to sell directly to plaintiffs, Lubrizol put

> plaintiffs in contact with its Cleveland area distributor, who now supplies plaintiffs with all the Lubrizol 2085A they desire. Plaintiffs continue to resell the product at a price lower than that offered by Jenkin-Guerin.
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>
> Plaintiffs must show that Lubrizol, as well as Jenkin-Guerin, was motivated by a desire to protect Jenkin-Guerin from price competition. . . . *Plaintiffs simply have not controverted Lubrizol's cogent evidence to the contrary.* Though there is sufficient evidence to allow the inference that Lubrizol terminated plaintiffs pursuant to an agreement with Jenkin-Guerin, *evidence is totally lacking to support the inference that Lubrizol was motivated by a desire to protect Jenkin-Guerin from price competition.*

Battle, 513 F. Supp. at 999 (emphasis added).

Where the district court applied a standard which required nothing more of plaintiffs than that they introduce some evidence of a "price related" motive by Lubrizol, and plaintiffs did not do so, summary judgment in Lubrizol's favor was correct and does not constitute a decision which should be reviewed through a writ of certiorari.

III. NEITHER THE PENDENCY OF MONSANTO CO. V. SPRAY-RITE SERVICE CORPORATION, NO. 82-914, NOR THE EXISTENCE OF OTHER CIRCUIT COURT DECISIONS CITED BY PETITIONERS, IS GROUNDS FOR REVIEW OF THIS CASE.

The petition at issue here rests in part on the curious premise that certiorari should be granted because the Eighth Circuit "impliedly," Petition at 8-9, reached a re-

sult inconsistent with *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), *cert. granted*, 103 S. Ct. 1249 (1983) (*Monsanto*), a decision by the Seventh Circuit now under review by this Court. Respondent respectfully suggests, first, that the district court's decision here is entirely consistent with this Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (*GTE Sylvania*), so that any arguable difference between *Battle* and a decision in another circuit (especially one now on review by this Court) is irrelevant, and, second, that there is no inconsistency in principle between *Battle* and *Monsanto*. Petitioners merely take exception to the application of the same principle to very different sets of facts, producing different results below.

As in *GTE Sylvania*, the issue here was whether to apply a *per se* rule under Section 1 to an alleged vertical agreement between a manufacturer and a distributor. In *GTE Sylvania*, this Court held that non-price vertical agreements present sufficient pro-competitive potential that they should be judged under the rule of reason, rather than the *per se* rule. *GTE Sylvania*, 433 U.S. at 49-50. At the same time, the Court declined to require that plaintiffs seeking to recover for resale price maintenance, i.e., vertical price fixing, satisfy a rule of reason standard, *GTE Sylvania*, 433 U.S. at 51, n. 17, so that vertical price fixing agreements continue to be *per se* illegal after *GTE Sylvania*. The district court decision here was, therefore, entirely unremarkable and quite correct in requiring petitioners, under *GTE Sylvania*, to offer some evidence of a vertical price restriction leading to their termination as a Lubrizol distributor before the court would apply a *per se* standard. Indeed, the district court arguably *lessened* the threshold – to the benefit of petitioners – by framing the test as whether Lubrizol acted for a "price related" motive, rather than requiring evidence of actual price fixing. Finding no evidence of vertical price restrictions even under this re-

laxed standard,[8] the district court's decision to enter summary judgment for Lubrizol is directly in the mainstream of jurisprudence after *GTE Sylvania*.

Moreover, the district court's resolution of the issue actually before it creates no principled conflict with *Monsanto*. Petitioners in this case *prevailed* in the district court on the first issue raised in *Monsanto:* whether an agreement can be inferred from the fact of complaints by some distributors about the activities of another distributor, coupled with the subsequent termination of the latter distributor. The Eighth Circuit *en banc* was unable to reach a majority decision to overrule that ruling, and it therefore stands. The only issue raised in *Battle* which is at all related to the issues in *Monsanto* is whether such an "agreement," if it can be inferred, is *per se* illegal because that agreement has a "price related end." Respondent submits that the lower courts in *Monsanto* and *Battle* applied the same principle to starkly different facts and reached different results only because of those different facts. As this Court has long ago warned, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

In *Monsanto*, the defendant manufacturer (1) was concerned about stabilizing the resale prices of its pro-

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[8] As the district court noted, petitioners' only evidence of "price related" motive did not indicate even that the complaining distributor, Mr. Krause, was concerned about plaintiffs' price competition. *Battle*, 513 F. Supp. at 999. Even if it had, "concern" about price competition is so universal and commonplace that courts could almost assume that distributors who complain about other distributors do so for a motive related to profits and prices. Such complaints are an everyday fact of commercial life. But, it would be unjustifiable, without more, to allow a fact-finder to infer from such complaints that the *manufacturer* had a "price related" motive, much less that it was actually engaged in resale price maintenance. Under *GTE Sylvania*, application of the *per se* rule to a manufacturer in such circumstances would be improper.

ducts, (2) initiated a suggested resale price program to do so, and (3) considered the plaintiff-distributor a price-cutter. *Monsanto*, 684 F.2d at 1238-39. In addition, the *Monsanto* plaintiffs introduced evidence that, after termination, Monsanto initiated a dealer boycott to prevent plaintiff from buying product from other Monsanto distributors. *Monsanto*, 684 F.2d at 1240.

In *Battle*, none of these facts are present. First, Lubrizol had no suggested resale price program and was unconcerned about resale prices according to the testimony of Mr. Battle himself. Second, while Lubrizol decided not to deal directly with petitioners for Lubrizol's own, proper business reasons, it had no objection to petitioners' obtaining the product elsewhere. In fact, Lubrizol put Mr. Battle in contact with another source which enabled petitioners to continue to compete against and undercut the complaining distributor.[9] The Court's consideration of *Monsanto* should not, given the lack of any evidence of price motivation in this case, affect the result herein.

IV. THIS CASE WAS DECIDED ON ITS OWN FACTS AND POSES NO OVERRIDING ISSUES MEET FOR CONSIDERATION BY THIS COURT.

A losing party frequently predicts "devastating" effects from an "aberrant decision." Petition at 13. In so arguing here, however, petitioners exaggerate considerably. The only issue here is the application of the *per se* theory

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[9] Petitioners' argument with respect to *Filco* v. *Amana Refrigeration, Inc.*, 1983-1 Trade Cas. (CCH) ¶ 65,450 (9th Cir. June 10, 1983) (*Filco*), Petition at 9-10, is incomprehensible at best. In *Filco*, the Ninth Circuit affirmed summary judgment for the defendant manufacturer on a claim similar to petitioners. The Ninth Circuit affirmed for the same reasons embraced by the four judges who voted in favor of affirmance in this case. To the extent that petitioners are trying to argue that certiorari should be granted by this Court to effectuate the policy of a lower court, they are simply and dramatically wrong about the decision in *Filco*.

to a particular set of facts. The only parties conceivably affected by decisions such as the decision here are those distributors which are terminated, but are unable *either* to show anticompetitive effects under the rule of reason, *or* to introduce a shred of evidence that they were terminated in order to effectuate a resale price agreement, thus bringing the *per se* rule to bear. This case was decided on a legal standard generous to petitioners; the case turned on a failure of proof. Respondent respectfully suggests that, if any *in terrorem* argument is appropriate, it is that reversal here, and the endorsement of petitioners' position, would mean that no manufacturer could terminate a distributor after receiving a complaint from another distributor involving any mention of price. That action, without more, would expose that manufacturer to all the costs and risks of a jury trial on a *per se* theory which, once found applicable, would preclude consideration of the manufacturer's justifications, no matter how salutary. Respondent suggests, in any event, that the *per se* rule has no application where there is *no* evidence that resale price maintenance or other price motive on the part of a manufacturer caused termination.

CONCLUSION

This case does not raise overriding issues of interpretation of Section 1 of the Sherman Act. It involves only a decision based on one party's failure to meet a minimal standard of proof which would have allowed it to withstand a motion for summary judgment. An equally divided court of appeals affirmed in a decision which creates no precedent. The only question petitioners raise relates to the particular facts of this case, of interest only to the parties to this dispute. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 8, 1983

APPENDIX

STATEMENT OF MATERIAL FACTS
(Supporting Respondent Lubrizol's
Motion for Summary Judgment)

1. Lubrizol is an Ohio corporation engaged in the bulk manufacture and sale of chemicals including oil and lubricant additives. Lubrizol's Diversified Products Division, which had 1979 sales of approximately $7 million, or approximately 1% of Lubrizol's sales (Bares depo. at 19), also manufactures and sells a rust preventive, or rust-proofing, compound under the trade name "Lubrizol 2085A" (hereinafter "2085A"). Lubrizol's decision not to sell that product to plaintiffs is the subject of plaintiffs' claims against Lubrizol. Lubrizol had total 1979 sales of $750 million. (Bares depo. at 19; Ehren depo. at 17).

2. Jenkin-Guerin is a Missouri corporation which purchases 2085A in bulk from Lubrizol, repackages the product and markets it under Jenkin-Guerin's trade name, "Anchor Tuflex," to persons who use the product to rust-proof automotive vehicles and fleets. In 1979, Jenkin-Guerin purchased approximately $600,000 of 2085A from Lubrizol; in the first 10 months of 1980, it purchased approximately $300,000. These purchases make Jenkin-Guerin Lubrizol's third largest customer for 2085A (Ehren depo. at 13-14). Defendant Mr. Krause is president of Jenkin-Guerin and owns 50% of its stock (Krause depo. at 5, 7-10).

3. Anchor [Supply Co.] is a Texas corporation and Bayview [Service and Supply Co.] is a Texas partnership, both controlled by Mr. Battle. The principal place of business for both entities is 2907 Bayshore Drive, Baycliff, Texas, which is also Mr. Battle's residence. Mr. Battle was employed as a fleet manager by General Telephone Company, a Jenkin-Guerin customer for Anchor Tuflex, until

late 1978. At that time Mr. Battle, doing business as Anchor Supply Co., began to purchase rustproofing compound from Jenkin-Guerin for resale. He had hoped to do so at a distributor's discount, but Jenkin-Guerin would only sell to him at the same price which all other Jenkin-Guerin customers paid (Battle depo. at 53-62). Since at least November 1979, Anchor's business has been principally the sale of its "Armor Shield" rustproofing compound, which is its own rebrand of 2085A (Battle depo. at 39, 141-142).

4. Gordon Watson is currently an employee of Anchor engaged in the sale of "Armor Shield." Prior to January 21, 1980, Gordon Watson was sales manager and salesman for Jenkin-Guerin, engaged in the sale of Jenkin-Guerin's Anchor Tuflex (Gordon Watson depo. at 18-20, 22-24).

5. Thomas G. Watson, son of Gordon Watson, is also a salesman for Anchor, selling Armor Shield. He was employed until December 15, 1980, in Jenkin-Guerin's service department (Thomas Watson depo. at 13-14, 41).

A. Lubrizol's Decision to Sell to Mr. Battle

6. Lubrizol first heard of Mr. Battle in June or July 1979. At that time, Gordon Watson, who was at the time a rustproofing salesman for Jenkin-Guerin, telephoned Mr. Irwin R. Ehren, Lubrizol's Manager, Rustproofing Products:

> A. He [Gordon Watson] said that he had a friend that had been a customer or who was acquainted with our product, as having worked for a customer. That was it. For a customer of his. And it was my understanding that it was a — an agency that did rust-proofing, that bought Jenkin-Guerin's product. And that this man was going to go into business for himself. And the area of endeavor was to coat bilge areas for shrimp boats and barges and so forth. Marine use. And that he was not able to sell material to this man, that the man

wanted to buy direct from Lubrizol, and if he couldn't buy direct from us he would buy from someone else. But he said would we be interested in talking to him.
Well, as I had mentioned earlier, this was an area that we felt was a good application area for 2085A, talking about bilge areas and boats, ships, and barges.
And naturally this being – we felt this would be a place where we could expand our sales.
We said we would be willing to talk to him.
And then Gordon said "Well, all right. I will have him call you."

Ehren depo. at 27-28.

Gordon Watson's recollection of that conversation is consistent with Mr. Ehren's:

Q. Do you remember calling Irv [Ehren] and saying that you had a friend in Texas who wanted to buy Lubrizol 2085A direct?

A. I recall a conversation with him, but I think it was up when I was doing some work in Cleveland, when I mentioned that a friend of mine and a customer of Jenkin-Guerin was interested in buying Lubrizol for application on the Gulf Coast area.

• • •

Q. Do you recall anything else about this conversation?

A. Well, I know that – no, I don't know. I believe that I mentioned something that he had looked at Tectyl Rustproofing for this application he was looking into, and I knew – I just felt it wouldn't work, but I felt that Lubrizol would.

Q. "He" is Jeff Battle you are saying looked at Tectyl?

A. Yes.

• • •

Q. All right, in that conversation with Irv [Ehren], you said that you mentioned to him that this

friend of your in Texas wanted to apply the product on the Gulf Coast?

A. Yes sir.

Q. What specifically did you tell Irv [Ehren] he had in mind doing?

A. On ships that were there; marine vessels that he was doing some work on that there was a need for.

Q. So you represented to Irv [Ehren] that this would be utilized in marine use basically, is that correct?

A. I didn't say only marine use, but I said that that was one of the things that this fellow was looking at.

Gordon Watson depo. at 51-53.

7. Lubrizol's first direct contact with Mr. Battle[1] was on July 17, 1979 when Mr. Battle called Mr. Ehren. Mr. Ehren memorialized this telephone call in a memorandum taken from notes made shortly after the call (Ehren depo. at 31-36). That memorandum . . . states, in pertinent part, as follows:

> Mr. Battle had been a user of Lubrizol's automotive rustproofing compounds for a number of years as a service manager in a dealership(s). His experience with these compounds influenced his decision to approach us as a supplier of rustproofing compounds for his new endeavor which is principally the rustproofing of offshore marine and industrial equipment, although he would also service some automotive also.
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> Bayview Service and Supply does not purchase Lubrizol rustproofing compound from any of our distributors and has no intention to do so because of the pricing. They would like to become a direct customer (distributor) and if we cannot sell to them direct, they will have to use someone else's material.
>
> Exhibit 1 to Ehren depo.

[1] The essence of this case is the employer-employee dispute between Jenkin-Guerin, on the one hand, and Gordon Watson and

his new employer, on the other. While the facts of that dispute are not necessary to the disposition of this motion, they are a part of the complete record and provide background for the initiation of the Battle-Lubrizol relationship:

Mr. Battle and Gordon Watson were acquainted with one another because Mr. Battle, while employed as a vehicle fleet manager for General Telephone Company, had purchased rustproofing compound from Jenkin-Guerin through Gordon Watson (Battle depo. at 40-43). After discussing with Gordon Watson Jenkin-Guerin's troubles with its Texas distributor (Battle depo. at 48-56), Mr. Battle in November 1978 went into business on his own hoping to become a rustproofing distributor for Jenkin-Guerin (Battle depo. at 53-59, 61). Battle and Jenkin-Guerin were unable to come to terms and their relationship deteriorated (Battle depo. at 61-62). Having learned that Lubrizol was the manufacturer of Jenkin-Guerin's product, which Mr. Battle had purchased from Jenkin-Guerin, Battle decided to approach Lubrizol (Battle depo. at 68-69).

In August or September, 1979, Gordon Watson, while still employed by Jenkin-Guerin, loaned Mr. Battle $20,000, unsecured and without a note, to be used by Battle to buy 2085A from Lubrizol (Gordon Watson depo. at 49-53; Battle depo. at 76-82). At about that time, Watson also accompanied Mr. Battle on some of Mr. Battle's sales calls and introduced Mr. Battle to two major Jenkin-Guerin customers on behalf of Mr. Battle's new company, Anchor Supply (Gordon Watson depo. at 72-79).

In November 1979, Tom Watson decided to leave Jenkin-Guerin (Tom Watson depo. at 32-34), and did so on December 15, 1979 (*Id.* at 41), taking with him documents, including a file of Jenkin-Guerin customers (*Id.* at 54, 94-97). Tom Watson immediately went to work for Mr. Battle and Anchor (*Id.* at 47-48), and used the customer file to solicit Jenkin-Guerin customers (*Id.* at 60-63).

Gordon Watson also left Jenkin-Guerin on January 21, 1980 and went to work for Mr. Battle and Anchor that same day (Gordon Watson depo. at 96-110, 118-119).

These occurrences are the subject of Jenkin-Guerin's counterclaims against plaintiffs and the Watsons; while they are not material to the issues involved on this motion, they show the background and context in which Lubrizol became involved in the underlying controversy among the Battles, the Watsons and Jenkin-Guerin.

8. Mr. Battle described this conversation, in pertinent part, as follows:

Q. And you spoke to Irv Ehren?

A. That's correct, I did.

Q. And his name had been given to you by Gordon Watson, is that right?

A. Yes.

Q. What was the nature of the telephone call, to the best you can recall it?

A. I discussed what I had in mind for marketing the product, and asked what the terms of sale were and how much I would have to buy each time I ordered and what the price per gallon would be, and things like that.

Q. And what did you tell Mr. Ehren was your purpose in buying or seeking to buy 2085A?

A. To market this material as a corrosion preventative compound primarily in the marine and industrial markets. I related to him the experience with the shrimp trawler, and some other discussions that I had with people with marine interests where I thought this compound could be very beneficial, and related their favorable reaction also, and the reasons. We went into coal tar coating and all that business. He sounded very enthusiastic about it too.

Q. Did you identify yourself as representing Bayview?

A. Yes, I did.

Q. Did you mention Anchor Supply at that time?

A. No. I did not.

Q. Did you tell him that you were already buying 2085A, or Anchor Supply was, from Jenkin-Guerin?

A. No, I did not.

Q. What did Mr. Ehren say to you?

A. Well, as best I recall, he was very interested at the prospect. I think I asked him if anybody had tried to market the Lubrizol material in that market before. And I believe he said not to his knowledge, or no, or something like that. So he was very interested. And, as a matter of fact, I think he said, "We would be very interested in that."

Battle depo. at 121-122.

9. Mr. Battle did not disclose the existence of Anchor, the other firm of which he was the principal, nor did he disclose that he, through Anchor, was then purchasing 2085A from Jenkin-Guerin. See Battle depo. at 121-122, quoted in paragraph 8, *supra*.

10. Mr. Ehren related this discussion to his superior, George J. Arkedis, Manager of Lubrizol's Diversified Products Division, including Mr. Battle's representation that he intended to use the product in marine applications (Ehren depo at 52; Arkedis depo. at 5-6).

11. Mr. Arkedis decided to accept Battle as a direct customer in order to see whether Battle could in fact develop the marine area as a new source of demand for 2085A (Arkedis depo. at 6-8). Mr. Arkedis authorized Mr. Ehren to notify Mr. Battle of his acceptance; Mr. Ehren did so by telephone on August 1, 1979, memorialized in a contemporaneous memorandum, Exhibit 4 to Ehren deposition, and a letter that date from Mr. Ehren to Mr. Battle, Exhibit 3 to Ehren deposition . . . . Both documents incorporate the author's understanding of Mr. Battle's representations that his major area of endeavor was to be marine coatings.[2] Mr. Battle did not reply to the letter (Ehren depo. at 156).

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[2] Mr. Battle subsequently discussed the marine use of the product when he placed his only order for the product in a telephone conversation with Lubrizol's Mrs. Daisy Barbur, a Customer Service Coordinator who arranged to have Battle's order shipped (Barbur depo. at 10; Battle depo. at 23-24).

12. Mr. Arkedis relied on Mr. Battle's representations of intended marine use in his decision to sell 2085A to Mr. Battle (Arkedis depo. at 45). Lubrizol does not seek to add new customers who only resell 2085A for automotive end use:

> Q. Why did Lubrizol have no desire or need to expand its customer base in the automotive end use area?
>
> A. Because it was my belief that there were going to be a certain number of automobiles sold in every year and that a certain percentage of them would be rustproofed, and you had a pre-defined market that you were dealing with. And it is my belief that our distributors had achieved a fairly high market penetration in a pre-defined market, and that to take on new customers in the automotive area would merely be diluting the business of each individual distributor and the net effect to Lubrizol would be we would still rustproof the same number of cars, still sell the same volume of product and be less profitable because we would have to service a greater number of accounts.
>
> Arkedis depo. at 52-53.

13. Lubrizol at one time had 10 to 15 distributors, but since 1976 their number had dwindled and Lubrizol now has only six distributors throughout the United States that resell 2085A for automotive use (Ehren depo. at 12-24). Lubrizol is satisfied with its present distribution coverage and the sales of 2085A its distributors produce and does not seek to add any new distributors for automotive end use (Arkedis depo. at 52-54; Bares depo. at 20-22; Ehren depo. at 43-45).

14. Lubrizol would, however, seek new distribution channels for new applications for the product because the additional expenditure for distributor support would have the potential for expanded sales. William G. Bares, Lubrizol Executive Vice President, Mr. Arkedis' immediate

superior and the Lubrizol officer with general corporate responsibility for the Diversified Products Group, summarized Lubrizol's policy with respect to the distribution of 2085A:

Q. Do you know of any conditions or policies with respect to accepting customers of 2085A?

A. We in the 2085A area are seeking to continue to cover the aftermarket, automotive aftermarket, rustproofing area.

Q. Do you mean by automotive aftermarket in the rustproofing area?

A. You can either put a rustproofing product on when the car is first made, and that would be part of the original equipment manufacturer, or you can put a rustproofing product on the car after it has been made. And that is what I would call the aftermarket. Aftermarket rustproofing.

Our policy is to seek to continue to cover that market in the manner and with the people, through the customers, that we presently have. Our policy is to look for other areas, other uses, other end uses for 2085A that would open up additional markets to us.

Q. Have you decided that the customers that you already have in the automotive aftermarket are sufficient to cover that market?

A. Yes. I certainly have.

Q. How have you made that determination and when?

A. With respect to how, there are a number of factors that are involved in that decision. First of all, an analysis of the total market. The total market is essentially new cars being produced.

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The trend in that total market is for smaller and smaller cars. Less and less metal and also better rustproofing protection in the original

equipment manufacture. Therefore, that market, I believe, is a declining market.

Q. Since when?

A. Over the last several years as the price of crude oil has gone up and the drive toward corporate average fuel economy by the government and the trend towards smaller cars. Since that time.

Based on that factor, on the factor that the Diversified Products Group is a relatively small group, has one salesman covering this entire area, and based on the fact that I feel that I would rather commit our corporate resources, our people, to developing products and different areas, in the areas that have either greater potential for 2085A or areas with greater potential for some of our other new products, these factors lead me to the conclusion that we are very happy with the share of that total market that we have, and that I don't seek to commit any more resources to developing further aftermarket equipment.

Q. Equipment? You mean material, 2085A?

A. Further aftermarket applications for 2085A.

Bares depo. at 20-22.

15. Following Mr. Arkedis' decision to sell 2085A to Bayview, Mr. Battle ordered, paid for, and was shipped one order of the product, consisting of 80 drums. This shipment was shipped on October 15, 1979 to a warehouse in Cleveland (Battle depo. at 127-30). While Lubrizol's distribution department knew of its destination, Mr. Arkedis, the person who made the decision to sell to Battle, did not (Arkedis depo. at 41-42).

B. Lubrizol's Decision to Cease Doing Business with Mr. Battle

16. At some time during January 1980, Mr. Krause made a number of telephone calls to Messrs. Arkedis and Ehren in which he told them, *inter alia*, over the course of

these conversations,[3] that Mr. Battle, under the name of Anchor Supply (*not* Bayview), had been purchasing Anchor Tuflex (Jenkin-Guerin's re-brand tradename for 2085A) from Jenkin-Guerin for resale. He also said that Mr. Battle was now offering 2085A under his own trade name to Jenkin-Guerin customers[4] (Arkedis depo. at 28) (which Lubrizol knew to be primarily automotive users (Ehren depo. at 16) at a price below Jenkin-Guerin's (Krause depo. at 93, 148-149). In one or more of his calls, Mr. Krause stated that he was upset and confused about the situation and wanted to know whether Lubrizol would continue to sell 2085A to Mr. Battle. Mr. Krause may have hoped that Lubrizol would no longer deal with Mr. Battle, but he did not convey this to Mr. Arkedis (Krause depo. at 138-139). While Mr. Arkedis was of the opinion that

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[3] Testimony differs as to the exact number of telephone calls involved. Because Jenkin-Guerin continues to be a Lubrizol customer, there have certainly been many other conversations between Jenkin-Guerin representatives and Lubrizol representatives in the normal course of business. Each witness involved, however, testified in response to questions from plaintiffs' counsel that he had testified as to *all* conversations involving Mr. Battle, Anchor or Bayview (Krause depo. at 139-140; Arkedis depo. at 42, 193-140; Ehren depo. at 106). Of the remaining two Lubrizol witnesses, Daisy Barbur did not testify as to any conversations with Jenkin-Guerin or Mr. Krause, and Mr. Bares testified that he had never spoken with Mr. Krause (Bares depo. at 19).

[4] Mr. Krause also related his other concerns about Mr. Battle, including the fact that Jenkin-Guerin's star salesman and his son, also a Jenkin-Guerin employee, had taken Jenkin-Guerin's customer list, were now in Mr. Battle's employ and were using that list to solicit Jenkin-Guerin's customers at a price lower than Jenkin-Guerin's price for Anchor Tuflex. These latter matters are the subject of claims and counterclaims between plaintiffs and defendants Krause and Jenkin-Guerin; this motion is not directed to those claims and does not require findings of fact as to the issues which may be raised thereby. Mr. Bares did not consider any of this information in deciding on behalf of Lubrizol to cease doing business with Mr. Battle. Statement of Material Facts ¶¶ 12-20.

Mr. Krause so hoped (Arkedis depo. at 36-37), Mr. Arkedis confirms that Mr. Krause did not ask him to cease dealing with Mr. Battle (Arkedis depo. at 30-36). See also Ehren depo. at 155.

Neither Mr. Arkedis (Arkedis depo. at 34-36) nor Mr. Ehren (Ehren depo. at 105-106) told Mr. Krause what Lubrizol intended to do with respect to Mr. Battle.

17. Mr. Ehren related the substance of his discussions with Mr. Krause to Mr. Arkedis (Ehren depo. at 106-107; Arkedis depo. at 39). Mr. Arkedis called Lubrizol's distribution department and determined that the one shipment to Battle had been shipped to a Cleveland warehouse, which struck Mr. Arkedis as an unusual place for storing the product, given Mr. Battle's stated purpose for buying 2085A (Arkedis depo. at 41-42).

18. Sometime in January 1980, armed with these facts, Mr. Arkedis decided that Mr. Battle had made misrepresentations to Lubrizol, and the next week took the matter to his superior, William G. Bares, Executive Vice President of Lubrizol (Bares depo. at 9). Mr. Bares suggested that Mr. Arkedis consult with Lubrizol's legal staff, which he did (Arkedis depo. at 46-48). Mr. Bares, after two conversations with Mr. Arkedis and after his own consultation with counsel, decided[5] that Lubrizol should cease doing business with Mr. Battle (Bares depo. at 15-16). Mr. Bares made his decision, based on the facts relayed to him by Mr. Arkedis, for two reasons: first, the very fact of Battle's false and misleading representations; second, the fact that Battle was not opening the marine market as a new area for marketing 2085A and would not be developing new areas for sales growth:

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[5] Neither Mr. Arkedis (Arkedis depo. at 44) nor Mr. Ehren (Ehren depo. at 114-116, 137) participated in the actual decision to cease dealing with plaintiffs.

Q. Why don't you want to do business with Bayview or Mr. Battle?

A. I have two reasons.

Q. What are they?

A. Number one, I believe that Mr. Battle indeed was not opening the marine area for use.

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A. We had no evidence at all of his opening the marine area to us. As a matter of fact, the information that we had was that the product was going into the automotive area.

The second reason was, I feel there was a question of ethics between Lubrizol and Bayview, honesty between Lubrizol and Bayview, and I believe strongly that any business relationship between two companies that is going to endure must be based upon honesty, complete honesty. Must be based upon no deception. And I believe that we had been deceived, that the original representations were less than totally accurate. And that was the second part, the second factor, in my making that decision.

Bares depo. at 37-39.

19. These were the *exclusive* reasons for Mr. Bares' decision; Mr. Bares explicitly excluded from his consideration any problems that Mr. Krause or Jenkin-Guerin might be having with Jenkin-Guerin's former employees, Mr. Battle, Anchor or Bayview or any price competition with any of those persons or firms. Mr. Bares felt that such problems were irrelevant to Lubrizol's relationship with Battle:

A. . . . I saw two aspects of the issue. Number one, the first aspect, is the relationship between Jenkin-Guerin and Bayview. And in that area, that we had no right to nor were we going to become in-

volved in any dispute between those two companies. So although there were facts that he mentioned in that area, I said "We are not going to become involved in that. If Jenkin-Guerin feels they have been wronged they have legal recourse."

The other aspect, the second aspect, is the relationship between Lubrizol and Bayview. Now in that area, looking specifically at that relationship, that was something that we ought to look at. . . .

Bares depo. at 10-11.

20. On February 26, 1980, Mr. Bares notified Mr. Arkedis and Lubrizol's distribution department by memorandum (Exhibit 1 to Bares depo.) . . . that Lubrizol would no longer do business with Mr. Battle, Anchor or Bayview. He instructed all who needed to know not to discuss the matter with Mr. Battle or with anyone else because he felt that it was a private matter between Lubrizol and Mr. Battle (Bares depo. at 55). On or about February 27, 1980, Mr. Battle spoke by telephone with Lubrizol's distribution department about a second order which he had been discussing with that department over the past weeks. Mr. Battle was told that his order could not be accepted and was referred to Mr. Ehren (Battle depo. at 133-37). Mr. Battle then spoke by telephone with Mr. Ehren, who confirmed that Lubrizol would not sell the product to Mr. Battle (Battle depo. at 134). Mr. Ehren had not been notified of Mr. Bares' reasons for Lubrizol's decision, only the decision itself, and so gave Mr. Battle no reason for the decision (Ehren depo. at 128). Mr. Ehren referred Mr. Battle to Mr. Bares who confirmed the decision; he declined to discuss his reason with Mr. Battle because he saw no point in entering into an argument with him (Bares depo. at 54; Battle depo. at 135). Since that time, Lubrizol has not made any sales to Mr. Battle.

C. Battle's Subsequent Business and Rustproofing Sales

21. After Lubrizol decided to cease dealing with Bayview, Mr. Battle called Mr. Arkedis during March 1980 and asked him for the name of a Lubrizol distributor in the Cleveland area from which he could purchase 2085A. Mr. Arkedis gave him the name and telephone number of a distributor, and Mr. Battle now purchases 2085A from that distributor (Battle depo. at 137-38). While Mr. Battle pays a higher price to that distributor than he did for his one shipment from Lubrizol (Battle depo. at 139-41), he is able to purchase product when he wants it and has a written undertaking from the distributor to supply him product:

Q. I think you've testified that you're getting the rustproofing compound from Eaton Oil.

A. I did.

Q. And they are located in Cleveland?

A. They are.

Q. Do you have any arrangements with Eaton Oil regarding supply?

A. I asked them for a guarantee that they would supply –

Q. And did they –

A. – after my experience with Lubrizol.

Q. Did they give that to you?

A. They did.

Q. And when did they give that to you?

A. They gave it to me – let's see. It would be March of this year [1980].

Q. When was your first order from Eaton Oil made?

A. March of '80.

Q. Is this arrangement that you have with Eaton Oil in writing?

A. The letter to me from Eaton Oil guaranteeing that they will supply me product is in writing from their vice president of sales.

Battle depo. at 229-230.

Battle has purchased one order of a competitive rustproofing compound manufactured by Chrysler Corp. He has also investigated competing rustproofing products offered by Ashland Oil and Witco, which are less expensive than 2085A although inferior, in Mr. Battle's opinion, but has not attempted to buy the Ashland or Witco products (Battle depo. at 104-106). Gordon Watson confirms that competitive products, although less desirable in his opinion, are available from Witco, Ashland, Chrysler and Ziebart (Gordon Watson depo. at 18-22), and testified that Anchor has had no problem in purchasing 2085A under its new supply arrangement (Gordon Watson depo. at 121-122).

22. As of October 14, 1980, the date of his deposition, Battle had sold only one drum of 2085A for marine use (Battle depo. at 26-29, 33). None of the material he purchased from Lubrizol was ever sold for marine use (Battle depo. at 146-147).

D. **Relevant Lubrizol Policies**

23. Lubrizol never discussed with Mr. Battle, Anchor or Bayview the price at which 2085A should be resold:

Q. In connection with your ordering of 2085A from Lubrizol, did anyone at Lubrizol ever say anything to you about what price you at Bayview or at Anchor Supply should charge for the product when you resell it?

A. In the first place, there was no discussion of Anchor Supply Company with Lubrizol. **And referring to your question about Lubrizol directing as to what**

we should charge for it on resale, there was none. As a matter of fact, Lubrizol or Irv [Ehren] made the statement in one conversation that I had with him that what their customers [did] with the product after they bought it from Lubrizol was none of Lubrizol's business, and Lubrizol, in fact, didn't even want to know what they did with it or how much they charged for it.

Q. And accordingly, no one ever asked you, and so far as you know Lubrizol didn't know, is that right?

A. That's correct. . . . And beyond that, it was expressed to me that they not only didn't want to know, but they really didn't care.

Battle depo. at 141-142
(emphasis added).

24. Similarly, Gordon Watson testified that, to his knowledge, Lubrizol never, in his more than ten years with Jenkin-Guerin, suggested the price at which Jenkin-Guerin should resell 2085A (Gordon Watson depo. at 123-124). Lubrizol witnesses testified that they are aware of and expect competition both among their distributors generally (Ehren depo. at 47-48), and by other distributors with Jenkin-Guerin in particular (Arkedis depo. at 73-78).

25. While Lubrizol has the capacity to expand its production of 2085A to meet new demand for the product if additional markets were developed (Bares depo. at 24-26; Arkedis depo. at 16-19; Ehren depo. at 18-19), expanded production of 2085A would mean a corresponding decrease in the production of other products manufactured in Lubrizol's plant. Mr. Bares testified, in pertinent part, as follows:

Q. Would you like to operate at full capacity?

A. One always seeks to operate their equipment at full capacity. However, our equipment typically,

our type of processing equipment, is batchwise. The chemical industries have two types of equipment, batch or continuous. Batch equipment is very flexible. So if I am not making product A in that equipment I can make product B in that equipment.

So the answer to your question is yes, I want that capacity filled. But I may be satisfied with a split of 50 percent product A and 50 percent product B or 70 percent product A and 10 percent product B and 20 percent product C.

Bares depo. at 23.